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No. 80-5

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

RICHARD JOHN McCARTY,
Appellant,

vs.

PATRICIA ANN McCARTY,
Appellee.

On Appeal from the Court of Appeal of California First Appellate District, Division Four

MOTION TO DISMISS OR AFFIRM

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The Appellee, Patricia Ann McCarty, respectfully moves to dismiss the Appeal herein or, in the alternative, to affirm the Judgment of the Court of Appeal of California in this case. Rule 16(1)(a), (b) and (d).

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MOTION TO DISMISS OR AFFIRM

A

MOTION TO DISMISS

Appellee moves to dismiss this Appeal for want of jurisdiction, and because the federal question sought to be reviewed was not properly raised below. Rule 16(1)(a), (b).

The statutory provision under which Appellant invokes this Court's jurisdiction—28 U.S.C. § 1257(2)—requires that the state court decision to be reviewed must have "drawn in question the validity of a statute of any state" on the grounds of a claimed repugnance to Federal law.

At *no point* in the proceedings below has Appellant ever drawn in question the *validity* of the California statute regarding quasi-community property (California Civil Code § 4803), nor has Appellant claimed that application of said statute to him renders that statute void. Rather, throughout the proceedings below, to the extent that Appellant has asserted any Federal claim whatsoever,[1] he has consistently asserted only that the application of California Civil Code § 4803 to him impairs rights granted to him by Federal statute.[2]

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[1]Although Appellant states that there is no transcript of the oral proceedings before the California Superior Court (Trial Court herein), in fact, such a transcript does exist and was referred to extensively by both parties in the briefs filed with the California Court of Appeal. Said Reporter's Transcript on Appeal was certifield by the Court Reporter on June 22, 1977; the Notice of Completion of Transcripts on Appeal was mailed by the Clerk of the Superior Court August 22, 1978 pursuant to Rule 8(a) of the California Rules on Appeal; and said Transcript was thereafter certified by said Clerk on Appeal.

An examination of said Reporter's Transcript reveals that neither party raised any federal question or issue whatsoever in the oral proceedings and oral argument at trial herein.

[2]Appellant's Trial Brief submitted by him to the Trial Court herein (filed May 20, 1977) raises no issue or claim whatsoever regarding validity or invalidity of a California statute. Said Trial Brief discusses only the issues of domicile (which are not subject of Appellant's appeal to this Court) and an assertion that Appellant's pension rights are nondivisible by the California Court because nonproprietary in nature.

Appellant's Post Trial Brief submitted to the Trial Court herein and filed May 20, 1977 again raises no claim or issue of invalidity of a state statute, and urges instead that "Petitioner's [Appellant herein] Federal pension 'rights' are neither 'vested' nor 'matured' within the meaning of *In Re Marriage of Brown* (1976) 15 C.3d

The California Court of Appeal in the present case was not asked to—and did not—address the issue of validity or invalidity of a state statute. The Court below was asked only to rule upon Appellant's assertion and claimed impairment of Federally created rights; and that is the only Federal claim or issue addressed by the decision of the Court below. The decision below rests squarely and exclusively on the decision of the California Supreme Court *In Re Marriage of Fithian* (1974) 10 C.3d 592, *cert. den.* 419 U.S. 825. *Fithian,* like the present case, deals solely with a claim of impairment of Federal rights, and does not draw in question the validity or invalidity of a state statute on any grounds.

Appeal to this Court does not lie from a state court denial of an assertion of Federal rights or privileges. *Mergenthaler Linotype Company v. Davis* (1919) 251 U.S. 256, 259; *Jett Bros. Distilling Company v. Carrollton* (1920) 252 U.S. 1; *Rohr Aircraft Corporation v. San Diego County* (1960) 362 U.S. 628; *Hanson v. Denckla* (1958) 357 U.S. 235, 244. "The mere objection to an exercise of

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838, and hence Petitioner has no property interest subject to division by this Court."

Appellant's Briefs to the California Court of Appeal below consistently asserted only that "California's Quasi-Community Property Scheme conflicts impermissibly with *rights* granted the husband under Federal legislation governing Army retirement pay" (Appellant's Opening Brief, Page 10); and that Appellant's "entitlement" to certain retirement pay may not be "diminished" by application of state law (Appellant's Opening Brief, Page 12).

Thus, although Appellant's contentions below have been inconsistent, the one consistency that does appear from all of his contentions is that he has never at any point in the proceedings below darwn in question the validity or invalidity of a California statute.

authority under a statute whose validity is not attacked cannot be made the basis for a writ of error from this Court." *Jett Bros. Distilling Company v. Carrollton*, 252 U.S. 1, at 6.

Appeal herein does not lie, and should be dismissed.

B

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM

Appellee moves this Court to dismiss the appeal herein, or in the alternative, to affirm the Judgement of the California Court of Appeal for want of a substantial federal question.

1. This Court Has Recently Declined Review of This Same Question.

The question presented by Appellant does not warrant plenary consideration by this Court. Since this Court's decision in *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572, this Court has twice been asked to review the same issue regarding military retirement and has twice denied such review. *Starren v. Starren* (California, 1979) (No. 78-1691) *cert. den.* 47 L.W. 3222, 62 L.Ed.2d 110; *Chisnell v. Chisnell* (Michigan, 1978) 267 N.W.2d 155, *cert. den.* 442 U.S. 940, 61 L.Ed.2d 310, *reh. den.* October 1, 1979.

In *Chisnell*, the decision of the Michigan Court below specifically cited the California case of *Fithian*, the same case relied upon by the California Court of Appeal in the Judgment herein.[3]

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[3]This Court has also denied review, post-*Hisquierdo*, in several cases presenting the issue of whether the Employment Retirement

2. The Question Is Not Important.

Plenary consideration of a question by this Court is not warranted simply because the Courts of various states—including both community and noncommunity property states—may give different treatment to military pensions or retirement benefits upon a divorce or dissolution of marriage.[4] Different states may also treat differently pensions in general, or houses, or the earnings of either spouse in accordance with each state's laws governing marriage and termination of marriage. Such variation and inconsistency, far from constituting an evil in need of correction by this Court, is a natural outgrowth of the peculiarily local character of Family Law. *In Re Burrus* (1890) 136 U.S. 586, 34 L.Ed. 500, 10 S.Ct. 850; *Buechold v. Ortiz* (9th Cir. 1968) 401 F.2d 371.

Appellant's attempts to find in such local variation a threat to the volunteer army ignores the well-established doctrine that a service member's domicile does not automatically follow that service member from one assignment

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Income Security Act precludes division of private pensions on dissolution of marriage. *Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California v. Johns* (No. 78-1422) Appeal dismissed, *cert. den.* 48 LW 3451; *Southern California IBEW-NECA Pension Plan v. Johnston* (No. 78-1445) *cert. den.* 48 LW 3452; *Carpenters Pension Trust Fund for Northern California v. Campa* (No. 78-1881) Appeal dismissed 48 LW 3451; *Trustees of Operating Engineers Pension Trust v. Pilatti* (No. 79-1076) *cert. den.* 48 LW 3569; *Operating Engineers Pension Trust v. Lionberger* (No. 79-1253) *cert. den.* 48 LW 3748.

[4]On July 17, 1980, the California Supreme Court unanimously reaffirmed that *Hisquierdo* does not preclude application of California community property laws to military pensions. *In Re Marriage of Milhan* (L.A. 31191). (Superseded opinion cited in Appellant's Jurisdictional Statement, Footnote 7).

station to another, but is, in each instance, a question of fact to be determined from the conduct of the individual service member involved. *Finger v. Masterson* (1957) 152 F.Supp. 224; *Wise v. Bolster* (1940) 31 F.Supp. 856; *Sweeney v. District of Columbia,* 113 F.2d 25, *cert. den.* 310 U.S. 631.

Furthermore, the incentive to forum shopping, if any, presented by variation among different states' laws regarding military pensions and retirement benefits after divorce is no greater than the incentive to forum shopping, if any, presented by the comparative ease or difficulty of obtaining a divorce or dissolution in various states, or the variation among various states regarding alimony and/or spousal support policies.

Finally, to the extent that any variation and/or inconsistencies may exist between the various types of military retirement plans and benefits for different branches of service, annuity programs, survivor benefit programs, and other similar benefits and plans provided by Congress for military personnel, such variations and/or inconsistencies are the creation of Congress, and the decision to create or not create uniformity among such benefit plans and programs properly rests with the Congress.

3. Hisquierdo Is Unique.

This Court's decision in *Hisquierdo* addresses only retirement benefits under the Railroad Retirement Act and the unique provisions of that Act. When Appellant asserts in his jurisdictional statement that "there is nothing unique in the structure of the Railroad Retirment System, which

makes it appropriate to limit *Hisquierdo* to railroad retirement benefits . . ." Appellant simply ignores the reasoning of this Court as stated in the *Hisquierdo* opinion, which opinion reaches the result it does specifically because the Railroad Retirement Act is unique, and does certain statutory provisions unique to it.[5]

Very simply, Appellant can point to no provision of Federal statute governing either Army retirement benefits specifically, or military retirement benefits in general, which is comparable to 45 U.S.C. § 231m in the Railroad Retirement Act. Appellant points only to 10 U.S.C. § 3929, which section does nothing more than direct the reader's attention to the proper section of the code for *computation* of the amount of Army retirement benefits.[6] This section simply will not support the great significance that Appellant attempts to attribute to it.

Central to this Court's decision in *Hisquierdo* was the anti-assignment and anti-anticipation provisions of § 231m. But with respect to the military, not only has Congress failed to include an anti-anticipation provision in any of

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[5]The specific code section on which this Court focused in the *Hisquierdo* opinion, 45 U.S.C. § 231m. provides,

> "Notwithstanding any other law of the United States or of any state, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or garnishment, attachment, or any other legal process under any circumstances whatsoever, *nor shall payment thereof be anticipated* . . . ." (Emphasis added.)

[6]10 U.S.C. § 3929 provides:

> "A member of the Army retired under this chapter is entitled to retired pay computed under chapter 371 of this title."

the statutes governing Army or military retirement and pension benefits, but in statutes governing assignability of Army pay in general, Congress has specifically stated that an *officer* of the Army *may assign* his pay.[7]

In the realm of Family Law, this Court has historically limited its review of alleged conflicts between state Family Law and Federal statute under the Supremacy Clause to determine whether Congress has "positively required by direct enactment" that state law be pre-empted. *Hisquierdo,* 439 U.S. at 581. The test requires that state family and family property law must do "major damage" to "clear and substantial" federal interests before this Court will find federal law to have overridden state family law. *Ibid.* Congress has not spoken so clearly with respect to military retirement. In fact, federal rulings have recognized the community property character of military retirement income. Revenue Ruling 63-169, 26 C.F.R. 1.37-3.

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[7] 37 U.S.C. § 701(a):

"Under regulations prescribed by the Secretary of the Army . . . a commissioned officer of the Army . . . *may* transfer or assign his pay account, when due and payable." (Emphasis added.)

37 U.S.C. § 701(c):

"An enlisted member of the Army . . . *may not* assign his pay, and if he does so, the assignment is void." (Emphasis added.)

CONCLUSION

Appellee urges that this Court should dismiss the appeal herein, for want of jurisdiction under 28 U.S.C. § 1257 (2). Furthermore, Appellee urges that the appeal herein be dismissed, or in the alternative, that the Judgment of the California Court of Appeal hereinbelow be affirmed, for want of a substantial federal question.

Dated: July 25, 1980.

Respectfully submitted,

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Counsel for Appellee